

1998

# State of Utah v. Marco Villalobos : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,

Plaintiff/Appellee,

vs.

MARCO VILLALOBOS,

Defendant/Appellant.

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Case No. 981795-CA

Priority No. 2

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**BRIEF OF APPELLANT**

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APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH COUNTY,  
STATE OF UTAH, FROM THE JUDGMENT, SENTENCE AND COMMITMENT  
ENTERED IN THIS CASE BY THE HONORABLE ANTHONY W. SCHOFIELD  
FROM A CONVICTION OF AGGRAVATED ROBBERY, A FIRST DEGREE  
FELONY, AND THEFT BY RECEIVING, A SECOND DEGREE FELONY

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**FILED**  
Utah Court of Appeals

MAR 12 2001

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Clerk of the Court

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**FILED**  
Utah Court of Appeals

MAR 12 2001

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Clerk of the Court

Attorney for Defendant

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IN THE COURT OF APPEALS  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff and Appellee,

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MARCO VILLALOBOS,

Defendant and Appellant.

ADDENDUM TO APPELLANT'S BRIEF


Appellate Court Case No. 981795

Priority No. 2

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No addendum to appellant's brief is necessary under Rule 24(a)(11) of the U.R.A.P.

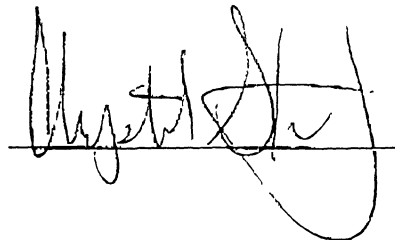
DATED this 12<sup>th</sup> Day of March, 2001.

  
Nelson Abbott

## CERTIFICATE OF MAILING

I hereby certify that I served a copy of the foregoing addendum to appellant's brief by placing a copy thereof in the United States Mail, postage prepaid, on March 12, 2001, addressed as follows:

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## IN THE UTAH COURT OF APPEALS

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### **JURISDICTION OF THE UTAH COURT OF APPEALS**

This Court has appellate jurisdiction in this matter pursuant to Utah Code Annotated § 78-2a-3(2).

### **ISSUES PRESENTED AND STANDARDS OF REVIEW**

1. Whether defendant's rights under the Utah and United States Constitutions were violated because the prosecution recommended prison for the defendant and jail for the co-defendants as a means of punishing the defendant for exercising his right to remain silent and his right of association. Because the sentence is being challenged, the standard of review is abuse of discretion. State v. Houk, 906 P.2d 907, 909 (Utah.Ct.App.1995). "Abuse of discretion may be manifest if the actions of the judge in sentencing were 'inherently unfair' or if the judge imposed a 'clearly excessive

sentence.' ' " Houk, 906 P.2d at 909. The issue was preserved for appeal below because it was briefed and raised in oral arguments. R. 256; R. 340, p. 42

2. Whether the defendant's rights were violated because the judge failed to correct mistakes in the presentence investigation report at the time of sentencing. Preserved below by argument made at the time of sentencing. R. 341, p. 7-9. Although the Court has not stated a standard of review on this particular issue, the standard of review should be clearly erroneous for factual determinations and correctness for legal determinations. State v. Strickling, 844 P.2d 979 (Utah App. 1992).

3. Whether the defendant was rendered constitutionally ineffective assistance of counsel by his attorney's failure to request a cautionary jury instruction regarding the inherently unreliable and not credible testimony proffered by co-defendants stating that Villalobos was involved in the alleged crime, especially in light of the State's preferential treatment of the co-defendants upon condition that they implicate the defendant. "To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel rendered a deficient performance that fell below and objective standard of reasonable conduct and that the deficient performance prejudiced the defendant." Tillman v. Cook, 855 P.2d 211, 221 (Utah 1993).

### **CONTROLLING STATUTORY PROVISIONS**

U.S. Const. Amend. I

U.S. Const. Amend XIV.

Utah Const. Art. I §7

U.C.A. §77-18-1(6)(a).

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case**

Marco Villalobos appeals from the sentence and commitment imposed by the Honorable Anthony W. Schofield after a jury trial where he was convicted of Aggravated Robbery, a first degree felony, and Theft by Receiving Stolen Property, a second degree felony.

#### **B. Trial Court Proceedings and Disposition**

Villalobos was charged by information filed in Fourth District Court on or about January 26, 1998, with Aggravated Robbery, a first degree felony, in violation of Utah Code Annotated § 76-6-302, and Theft by Receiving Stolen Property, a second degree felony, in violation of Utah Code Annotated § 76-6-408 (R. 1-2). In addition, the State sought a group crime enhancement pursuant to Utah Code Annotated § 76-3-203.1 (Id.). On February 19, 1998, a preliminary hearing was held and Villalobos was bound-over for arraignment (R. 17-18, 26).

On March 25, 1998, Villalobos filed a Motion to Suppress Evidence on grounds of an illegal, non-consensual search under the Fourth Amendment to the United States Constitution and Article I, § 14 of the Utah Constitution (R. 28-38). Villalobos also

filed a motion to suppress incriminating statements made by a co-defendant (R. 39-48). After a hearing, the trial court denied Villalobos' motions (R. 65, 342).

On July 13-14, 1998, a jury trial was held in this matter with Judge Schofield presiding (R. 226-30, 338, 339). A co-defendant, Richard Houston was tried in the same proceedings. During deliberation, the jury submitted a question concerning whether Steve Tiede or Ashley Cloward testified that they recognized Villalobos' voice (R. 224). After deliberation, the jury returned with a verdict of "guilty" as charged on both counts (R. 232).

After trial but prior to sentencing, Villalobos filed a motion to declare the group crime enhancement statute unconstitutional (R. 250-276). After a hearing, the trial court denied Villalobos' motion (R. 314-16). At sentencing on October 26, 1998, however, the trial court did not impose the gang enhancement but sentenced Villalobos to concurrent terms of 5-life and 1-15 years in the Utah State Prison (R. 317-19).

On November 25, 1998, Villalobos filed a notice of appeal with the Fourth District Court (R. 326). On April 1, 1999, the Utah Supreme Court transferred Villalobos' appeal to this Court and this action followed (R. 336). Villalobos made a motion pursuant to UTAH R. APP. P. 23B to remand the case back to the trial court for entry of findings of fact regarding claims of ineffective assistance of counsel, which motion was granted on April 21, 2000 (R. 343). After an evidentiary hearing on that issue, the trial court issued a Memorandum Decision wherein it found that Villalobos

was not prejudiced by the absence of an alibi witness during trial (R. 353-352).

Defendant's motion to strike briefs, supplement the record and stay the briefing schedule was granted by this Court on October 25, 2000.

### **STATEMENT OF RELEVANT FACTS**

#### **A. Testimony of Steven Tiede**

Steven Tiede testified that he resides in an apartment located above the garage at his parents house at 1949 North 85 West, Orem (R. 338 at 62-64). Early in the morning on January 16, 1998, he was in his apartment with three friends playing Nintendo (R. 338 at 64-65). Five individuals – three wearing ski masks – entered the apartment carrying pipes and boards (R. 338 at 65-66). The assailants informed Tiede and his friends that they had a gun which would be used if they did not cooperate (R. 338 at 68). Tiede testified that one individual carried a 15-inch metal pipe or bar and another carried a piece of wood (R. 338 at 69). The assailants ransacked his room and took personal property (R. 338 at 72).

Tiede testified that one of the individuals wearing a ski mask was William Screws, who was later apprehended in the apartment (R. 338 at 69-70). Jeff Richman also wore a ski mask and carried the metal pipe (R. 338 at 70). The two individuals without masks stayed mostly by the door “just kind of observing” (R. 338 at 70-71). However, Tiede testified that one of the unmasked individuals took his wallet (R. 338

at 73). Tiede did not see or recognize either of the unmasked individuals in the courtroom (R. 338 at 75).

Tiede testified that the individuals were in the room approximately two minutes before his mother yelled from the hallway (R. 338 at 73). Four of the assailants then fled the apartment and William Screws was apprehended (R. 338 at 74).

**B. Testimony of William Screws**

William Screws testified that he plead guilty to aggravated robbery and theft by receiving for an incident which occurred on January 16, 1998, in Orem in exchange for a sentencing recommendation from the State in favor of probation rather than a prison sentence (R. 338 at 79-80). In fact, Mr. Screws was sentenced to jail rather than prison. (R. 338 at 80). Screws testified that he committed the crimes with Jeff Richman, Rich Houston, Villalobos, and a guy named Mo (R. 338 at 81).

Screws testified that on the evening of the 16<sup>th</sup> he was at Richman's house with Richman and Villalobos (R. 338 at 82). The three of them talked about going to a "guy's house and getting some bud [marijuana]" (R. 338 at 82-83). Screws testified that Villalobos and Richman left to look for a car while he waited at the house (R. 338 at 83-84). Villalobos and Richman returned without a car so the three of them took some tools and walked about 12 blocks before they found a Saturn automobile which they took to Richman's house (R. 338 at 84-86).

The three then left Richman's house and went to "Adam's house" where they met up with Houston, Mo and Adam (R. 338 at 86). Screws testified that they informed the others of the stolen car and of the plan to break into a house and steal some marijuana (R. 338 at 87, 92). Then five of them then climbed into the vehicle, with Mo driving, and went over to the house (R. 338 at 87). Once at the house, they ran upstairs (R. 338 at 88). According to Screws, Mo and Houston did not want to wear masks but he, Villalobos and Richman did (R. 338 at 88-89, 111). Screws testified that Richman carried a pipe or bar in his hand (R. 338 at 110).

Screws testified that at the top of the stairs, someone knocked on the door and then all five of them walked inside (R. 338 at 90). Screws testified that he could not remember whether there was an invitation to enter the apartment (R. 338 at 116). The five men started yelling and telling people to get on the ground and Screws pretended to hold a gun under a stocking cap (R. 338 at 90). Screws testified that he saw Houston take a Nintendo 64 from the apartment (R. 338 at 91).

Screws testified that when they heard Tiede's mother knock on the door, the other four left the apartment but he was apprehended (R. 338 at 91-92). Upon being arrested, Screws informed the police that they had gone to Tiede's house because he owed him money (R. 338 at 102). Screws also told the police that he was not involved in stealing the car (R. 338 at 102-03). Screws testified that he lied to the police during



the initial interview but that his testimony at trial – after he had been offered a plea bargain and had been sentenced – was the truth (R. 338 at 105).

### **C. Testimony of Jeff Richman**

Jeff Richman testified that he too plead guilty to aggravated robbery and possession of a stolen vehicle for the events of January 16, 1998 (R. 338 at 119). In return, Richman was given a reduced sentence (R. 338 at 146). In fact, Mr. Richman was given a suspended prison sentence and was placed on probation (R. 338 at 160). Richman testified that Screws was living with him on January 16, 1998 (R. 338 at 119) and that on that date, Richman, Screws and Villalobos discussed taking two pounds of marijuana from a “guy’s” house (R. 338 at 121-23). Richman testified that they took a car they found about 4 blocks from his house (R. 338 at 123-24). Richman testified that he and Screws first went to find and take the car and then subsequently took Villalobos with them to act as look-out while they actually took the car (R. 338 at 124-26).

The three of them drove it back to Richman’s house and then drove to Brenda Savage’s house, whose son Adam is a friend of Richman (R. 338 at 126-27). Richman testified that while they were at the Savage home, Adam arrived with Houston and Mo (R. 338 at 127-28). Richman testified that they were drinking Tequilla (R. 338 at 128).

Richman said they asked Houston and the others if they wanted to come take the marijuana with them (R. 338 at 129). Richman testified that he, Villalobos, Screws, Mo and Houston then left the house (R. 338 at 129).

Richman testified that it took them ten minutes to get to the house and that when they arrived, they sat outside “for a bit” before moving towards the door (R. 338 at 130). Richman, Screws and Villalobos put on ski masks (R. 338 at 132) and Richman carried a pipe or bar (R. 338 at 132-33) while Screws carried a piece of wood (R. 338 at 134). Villalobos carried no weapon.

Richman testified that someone knocked on the door and that someone from inside said “‘come in’, so we went in” (R. 338 at 135-36). Richman said that they saw “a bunch of people” sitting inside and that they asked them for some “weed” (R. 338 at 136). Richman was holding the bar in his hands and he told the individuals inside to get on the ground and to give him their wallets (R. 338 at 137). Richman testified that during the ten minutes he was in the apartment he took wallets and looked for weed (R. 338 at 138-39).

Richman testified that when a girl screamed about being robbed, “we took off out of the house” and ran to the car (R. 338 at 140). Richman had wallets in his possession (Id.) and he dropped the bar on his way out the door (R. 338 at 142). Mo drove the car, while Richman rode in the passenger seat and Houston and Villalobos sat in the back seat (R. 338 at 141-42). They drove to Richman’s house and dropped the

car off down the block (R. 338 at 142-43). Richman changed his clothes, went downstairs and hid (R. 338 at 143).

**D. Testimony of Mark Pulley**

Mark Pulley testified that on the evening of January 16, 1998, he was at Steve Tiede's residence with Steve and two others when a "bunch of dudes busted in and robbed the place" (R. 338 at 191). Five individuals entered the residence and that three of them were wearing masks (R. 338 at 194). Pulley testified that the individuals were carrying a 2x4 and a lead pipe and threatened to use a gun that was never displayed (R. 338 at 195). The individuals threatened them – especially Tiede – and that they took stuff from the apartment (R. 338 at 196-97). Approximately 3-4 minutes after entry, the individuals left when they heard Tiede's mother yell (R. 338 at 197). However, Screws was apprehended before he could leave (R. 338 at 197-98).

**E. Testimony of Larry Barton**

Larry Barton, the stepfather of Steve Tiede, testified that on January 16, 1998, there was a disturbance in Tiede's apartment/room which is adjacent to his home (R. 338 at 211). Barton said that his wife first heard the disturbance and said "hey, they're here again" (R. 338 at 212). Barton said his wife left their room and he followed (R. 338 at 213). Barton's wife was hit in the face by a pipe thrown by an individual in blue clothing and a ski mask (R. 338 at 213-14). Barton testified that he picked-up the pipe and chased at least two individuals down the steps (R. 338 at 214-16). Barton was

about to apprehend one individual wearing a mask when another yelled from the car, “just shoot him, take out your gun” (R. 338 at 216, 218). Barton testified that he stopped the chase and the individuals got in the car and left with the two masked individuals sitting in the rear (R. 338 at 216-17, 219)

**F. Testimony of Jolene Young**

Jolene Young testified that she lived in Orem in January of 1998 (R. 338 at 232). On January 15-16, 1998, her plum colored Saturn automobile was taken from her drive-way (R. 338 at 233, 238). Young discovered it was missing when she received a call asking if she had allowed someone to borrow the car (R. 338 at 238).

**G. Testimony of Ashley Cloward**

Ashley Cloward testified that she was at Steve Tiede’s residence on January 16, 1998, with Tiede, Pulley and another individual (R. 338 at 241). Cloward said that they were playing Nintendo at approximately 2-3 a.m. when a “bunch of guys” opened the door (R. 338 at 242). Three of the men wore masks and two did not (R. 338 at 243-44). The individuals told them to lie on the floor (R. 338 at 245). Cloward testified that she recognized Screws as one of the individuals in a mask and that he pretended to have a gun (R. 338 at 245). Cloward said that one individual stood over Tiede with a pipe and threatened him (R. 338 at 246). Cloward testified that someone in a mask – other than Screws – took the Nintendo, and that two amps, her pager and

keys were also taken (R. 338 at 246). When Tiede's mother came to the door, the individuals fled (R. 338 at 247). Tiede's mother tackled an individual wearing a mask and retrieved a boom box while his stepfather chased another masked individual (R. 338 at 247-48). Cloward testified that four individuals – two that were masked and two that were not – got in the car and left but not before she got the license plate number (R. 338 at 249-50).

#### **H. Testimony of Richard Houston**

Richard Houston testified that early in the morning on January 16, 1998, he was at Adam Heaton's house with Mo when Richman, Screws and Villalobos came over (R. 339 at 13-14). Houston testified that Richman asked him if he wanted to go get some marijuana from this "guy" who had some (R. 339 at 14-15). Houston said there was no talk of a robbery or break-in or of a stolen car (R. 339 at 15). Houston said that he agreed to the proposition and left with Richman and Mo (R. 339 at 15). Houston could not remember if Screws was with them because he was drunk (R. 339 at 15-16).

Houston recognized the house they went to because he had been there a couple of months previous to use the phone (R. 339 at 16). Houston testified that there was no conversation in the car about robbery or hurting anyone, etc. (R. 339 at 17). Houston testified that he saw a mask or cap in Richman's pocket (R. 339 at 17-18).

Houston testified that when they arrived at the house, they all got out of the car (R. 339 at 18). Houston testified that he stood by the car and then went to use the

bathroom while the others went inside (R. 339 at 18-19). Houston believed that they were at the house to get some marijuana (R. 339 at 19). Houston testified that Mo, too, remained outside (R. 339 at 19). Houston testified that he and Mo then heard people yelling inside so they went upstairs to see what was going on (R. 339 at 19-20). When they reached the top of the stairs, Houston testified that he “saw people on the ground and people coming running out” (R. 339 at 20). When Houston saw this, he returned to the back seat of the car with Mo right behind him (R. 339 at 20-21). The others soon returned to the car and they left (R. 339 at 23).

Houston testified that he did not know if Villalobos was with them at the house but that he was at Richman’s house afterwards when the police came and they were arrested (R. 339 at 37).

### **SUMMARY OF ARGUMENT**

I. Richman and Screws were admittedly the ring leaders during this incident and were the only assailants to carry weapons. While the evidence suggests that Houston and Villalobos might have participated, the evidence is also clear that they did not instigate the incident, nor did they carry weapons or directly threaten or harm the victims.

At the time of arrest, Richman and Screws confessed to the police and made their confessions on video tape. The prosecutor offered to drop the group crime penalty enhancement and recommend probation if Richman and Screws plead guilty as

charged and testified at court. No plea bargain was offered to Villalobos because the prosecutor believed Villalobos was in a gang and because he did not confess at the time of his arrest.

While a prosecutor has discretion in making plea agreements, a prosecutor may not punish a defendant for exercising a constitutional right. In this case, the prosecutor did punish Villalobos for exercising his right to remain silent. Although less culpable than his co-defendants, Villalobos has been sentenced to spend several years in prison for choosing to remain silent while his co-defendants who admitted to instigating the incident and being guilty of more serious crimes are on probation. Further, the prosecutor violated Villalobos' right to freely associate by refusing him a plea bargain because he believed he was in a gang. Because the prosecutor exercised his discretion in such a way as to violate Villalobos' constitutional rights, the trial court should have sentenced Villalobos as the co-defendants. In other words, Villalobos should have been given probation.

II. At the time of sentencing, the defendant pointed out numerous errors in his presentence investigation report. The trial judge never addressed the errors on the record. Therefore, the case should be remanded so that the trial court can properly address the errors on the presentence investigation report.

III. Villalobos' trial counsel rendered ineffective assistance by failing to request a cautionary jury instruction regarding the unreliable nature of testimony from co-

defendants implicating the defendant. The outcome of this case hinged upon credibility. The co-defendants in this case had obviously selfish motives to testify against Villalobos and thus a clear conflict of interest. Their testimony was unduly prejudicial to Villalobos, unreliable, and not credible. Nonetheless, it was the only evidence implicating Villalobos because no one else could identify him or place him at the scene of the alleged incident. Villalobos' attorney failed to protect Villalobos' right to a fair trial when he neglected to have the jury instructed accordingly.

## **ARGUMENT**

### **POINT I**

#### **THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE PROSECUTOR'S FAILURE TO OFFER THE DEFENDANT THE PLEA BARGAIN OFFERED TO THE CO-DEFENDANTS**

The State originally charged four adults in this crime, Mr. Richman, Mr. Houston, Mr. Villalobos and Mr. Screws. The State then offered plea bargains to Mr. Richman and Mr. Screws. The plea bargain was that if they plead guilty to the crimes as charged and would testify at the trial, the State would not seek the group crime penalty enhancement and would recommend probation. Screws and Richman did plead guilty, they did testify, the group crime penalty enhancement was not imposed and they were placed on probation.



Both the Utah Constitution and the United States Constitution demand that “persons similarly situated should be treated similarly... .” Malan v. Lewis, 693 P.2d 661, 669 (Utah 1984). Moreover, “[b]asic principles of equal protection of the law are inherent in the very concept of justice and are a necessary attribute of a just society.” Malan, 693 P.2d at 670. In a concurring opinion to Railway Express Agency Inc. v. New York, 336 U.S. 106, 113 (1949), Justice Robert Jackson stated: “Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.” In this case, that did not occur.

A careful review of the facts shows that Mr. Richman and Mr. Screws carried weapons. While there was some evidence that a third weapon was involved, there was no evidence to the effect that Mr. Villalobos carried the third weapon. The evidence further showed that Mr. Richman and Mr. Screws were the ring leaders in the crime and that Mr. Villalobos participated on a more passive basis.

The prosecutor chose to offer plea bargains to Mr. Richman and Mr. Screws, instead of to Mr. Villalobos and Mr. Houston. The prosecutor’s reason for doing so is stated in a letter he sent to defense counsel and filed with the court. R. 252. The letter explains that the prosecutor treated the defendants differently because Mr. Richman and Mr. Screws gave full video-taped confessions to the police at the time of their arrest. Because Mr. Villalobos did not give a confession to the police, he was not offered a plea bargain. Further, because the prosecutor believed Mr. Villalobos was in a gang,

he did not offer a plea bargain. At the time of sentencing, however, the trial judge questioned that statement because the co-defendants were in a gang but were offered plea agreements. R. 340, p. 45.

In North Carolina v. Pearce, 395 U.S. 711 (1969), a defendant was convicted and sentenced to a prison term. After winning his appeal and after being convicted again, the defendant was sentenced to a more lengthy prison term. The Supreme Court held that his second sentence violated his due process rights because he was being punished for exercising his right to an appeal. In Bordenkircher v. Hayes, 434 U.S. 357 (1978), a prosecutor told a criminal defendant that if the defendant did not accept a plea bargain, the prosecutor would indict him on more serious charges. The Supreme Court held that such conduct was not a violation of the defendant's due process rights. In so ruling, however, the Court was careful to state that prosecutors did not have unfettered discretion. The Court stated, "[t]hough to punish a person because he has done what the law allows violates due process, there is no such element of punishment in the 'give-and-take' of plea bargaining as long as the accused is free to accept or reject the prosecutor's offer." Bordenkircher at 357 (citation omitted). The Court went on to state, "[t]here is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise." Bordenkircher at 364. The Supreme Court explained the differences between

the Pearce and the Bordenkircher cases. The Court pointed out that in Bordenkircher, the prosecutor was attempting to discourage the defendant from exercising his constitutional rights in the future. In Pearce, on the other hand, the defendant was being penalized for exercising his constitutional rights in the past. Bordenkircher at 362-63.

In this case, Mr. Villalobos is being punished for exercising past constitutional rights. In his letter, the prosecuting attorney explained that Mr. Villalobos was singled out from the co-defendants because he refused to give a video confession or otherwise cooperate with the police at the time of his arrest. In other words, because Mr. Villalobos exercised his right to remain silent, he was not offered a plea bargain. Similarly, the prosecutor refused to offer a plea bargain to Mr. Villalobos because he was a “known” gang member. In other words, since the prosecutor believed that Mr. Villalobos had associated with street gang members, Mr. Villalobos was not offered a plea bargain. Strangely, however, the co-defendants who were also allegedly in the same street gang were offered plea bargains. By punishing Mr. Villalobos for exercising those rights, Mr. Villalobos’ constitutional rights have been violated.

In order to remedy that wrong, this Court should reverse the sentence imposed by the trial court and remand the case with instructions that Mr. Villalobos be resentenced as though the prosecutor recommended probation and does not seek the group crime enhancement.

## **POINT II**

## **THE TRIAL JUDGE SHOULD HAVE MADE CORRECTIONS TO THE PRESENTENCE INVESTIGATION REPORT ON THE RECORD**

At the time of sentencing, the defendant pointed out several errors in the presentence investigation report to the judge. R. 341, p. 7. The errors are as follows: (a) the report inaccurately stated that Mr. Villalobos stole an automobile as part of this crime, R. 341, p. 8; (b) the report inaccurately stated that \$3,000 in computer equipment had been stolen, R. 341, p. 8; (c) the report failed to list all of the jobs which the defendant had held, R. 341, p. 8; (d) the report inaccurately stated that Mr. Villalobos had carried a weapon during the commission of the crime, R. 341, p. 9. The trial court failed to address any of the inaccuracies on the record.

In State v. Jaeger, 973 P.2d 404 (Utah 1999), the defendant claimed inaccuracies in the presentence investigation report. This Court held that the trial court was required to either grant a ten day extension or correct the inaccuracies on the record. The reasoning of the court was simply that U.C.A. §77-18-1(6)(a) requires the trial court to do so. The procedure is important to criminal defendants because even if the judge does not sentence the defendant based upon the inaccuracies in the report, those inaccuracies will follow the defendant to prison and to the board of pardons. This Court remanded the case with instructions that the trial court fully comply with U.C.A. §77-18-1(6)(a).

Jaeger is directly on point. The defendant pointed out several inaccuracies in the presentence investigation report to the trial judge. Unlike Jaeger, however, the trial judge never addressed the inaccuracies. Instead, the trial judge simply sentenced the defendant.

As in Jaeger, this case should be remanded with instructions that the trial court comply with U.C.A. §77-18-1(6)(a).

### **POINT III**

#### **TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHEN IT FAILED TO REQUEST A CAUTIONARY JURY INSTRUCTION REGARDING THE UNRELIABLE NATURE OF CO-DEFENDANTS' TESTIMONY, THEREBY DENYING VILLALOBOS OF A FAIR TRIAL**

Greg Smith, Villalobos' trial counsel, failed to render effective assistance when he neglected to request an appropriate cautionary jury instruction regarding the unreliable and not credible nature of co-defendants' testimony implicating Villalobos as one of the masked assailants. Screws and Richman had an ulterior motive to testify against Villalobos. Had they not agreed to do so, they would have faced extended prison terms because both were ring leaders in the commission of the crime and both brandished deadly weapons and in fact harmed an alleged victim as a result. In order to profit from the State's promise to recommend probation only, Screws and Richman had to implicate someone. The outcome of this case hinged upon credibility –

specifically upon the credibility of two dangerous criminals who had to produce another defendant for the State to prosecute.

In State v. Maestas, 984 P.2d 376, 380-381 (UT 1999), the Court held that when the only defense available to the defendant was the unreliability of eyewitness identification, trial counsel's failure to request a cautionary instruction seriously undermined the fairness of trial and rendered counsel's assistance constitutionally ineffective. This case is applicable to the facts presented here. Villalobos' only defense was to show that Screws and Richman's testimony was not credible, yet there was no jury instruction about properly weighing the sufficiency of the evidence in this regard.

The co-defendants in this case had selfish motives to testify against Villalobos and thus a clear conflict of interest. Their testimony was unduly prejudicial to Villalobos, unreliable, and not credible. Nonetheless, it was the only evidence implicating Villalobos because no one else could identify him or place him at the scene of the alleged crime. Villalobos was deprived of his right to a fair trial and ultimately of his liberty based on unreliable, not credible, and prejudicial testimony. Villalobos' attorney failed to protect Villalobos' right to a fair trial when he neglected to have the jury instructed accordingly.

### **CONCLUSION AND PRECISE RELIEF SOUGHT**

Based upon the foregoing arguments, Villalobos respectfully requests this Court to vacate his conviction and sentence.

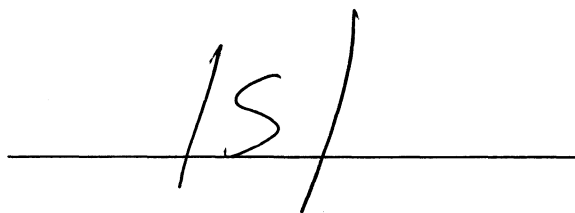
RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of February, 2001.

A handwritten signature in dark ink, appearing to be 'Nelson Abbott', written over a horizontal line.

Nelson Abbott  
Counsel for Marco Villalobos

**CERTIFICATE OF MAILING**

I hereby certify that I delivered two (2) true and correct copies of the foregoing  
Brief to the Appeals Division, Utah Attorney General, 160 E. 300 South, 6<sup>th</sup> Floor,  
P.O. Box 140854, Salt Lake City, Utah 84114 this 27<sup>th</sup> day of February, 2001.

A handwritten signature, appearing to be the letters 'LS', is written over a horizontal line.